

detailed investigation.<sup>747</sup> [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section above.]

458. The Cable Operators undertook upgrades to their facilities involving overlash and replacement of active and passive electronics between 1999 and 2002.<sup>748</sup> [Complainants cannot stipulate to this because it is not a complete statement of Complainants' upgrade activities. Upgrades include overlash, replacement of electronics and underground construction.<sup>749</sup>] EAI recorded a significant number of outage and trouble reports attributable to CATV facilities, and proceeded based on this information to contact the Cable Companies with their concerns.<sup>750</sup> When remediation did not occur, or was inadequate as in the case of Comcast, EAI proceeded to conduct test inspections of several electric circuits in the Comcast, Alliance and WEHCO service territories. When test inspection results illustrated a significant percentage of non-compliant attachments, EAI engaged USS to conduct a full safety inspection of the cable plant for these operators. The test inspections verified and validated the need to

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<sup>747</sup> Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15, Attachments A, C; Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 10 at ¶ 8.

<sup>748</sup> Carpenter Decl. Resp. Ex. 5. Reply at p. 30.

<sup>749</sup> See e.g., Billingsley Reply Decl. ¶ 52.

<sup>750</sup> Lovell Decl. Resp. Ex. 13 at ¶¶ 7-12; Letter from W. Darling to M. Gardner, Resp. Ex. 22; Resp. Ex. 90-93.

proceed to a full inspection.<sup>751</sup> EAI would not have conducted the full safety inspections if the test inspections had revealed few problems.<sup>752</sup>

[Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section above.<sup>753</sup> Further Complainants believe that the survey was designed to generate violations to substantiate USS' charges.<sup>754</sup> For the reasons set forth above, the inspection was designed to generate revenue and rehabilitate EAI's plant.]

459. The safety inspections were not intended or designed to inappropriately upgrade EAI's plant at the Cable Operators' expense.<sup>755</sup> EAI's costs related to the storm were recovered through a proceeding before the Arkansas Public Service Commission.<sup>756</sup> [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section above.]

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<sup>751</sup> Resp. 31; Lovell Decl. Resp. Ex. 13 at ¶¶ 9-12; Comcast Action Plan, Resp. Ex. 21; Outage and Trouble Reports, Resp. Ex. 90-93; Arnett Decl. Resp. Ex. 1, Attachment B.

<sup>752</sup> Inman Decl. Resp. Ex. 9 at ¶ 7.

<sup>753</sup> Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

<sup>754</sup> Gould Decl. ¶ 24-25; Agenda, 2<sup>nd</sup> Joint Wire & Pole Usage Conference at 5.

<sup>755</sup> Gramling Decl. Resp. Ex. 7; Stevens Decl. Resp. Ex. 15; Inman Decl. Resp. Ex. 9 at ¶ 16,

<sup>756</sup> Inman Decl. Resp. Ex. 9 at ¶ 16; Strickland Decl. Resp. Ex. 16 ¶ 4.

460. Each company was given an opportunity to participate in the full inspections of their facilities, but declined to do so.<sup>757</sup> [Complainants cannot stipulate to the second sentence because it is not a complete statement of Complainants' upgrade activities. Complainants cannot stipulate to the last sentence because Complainants dispute that they were given an opportunity to participate in the inspections.]

### 3. Stipulated Points of Law

461. None

### 4. Disputed Points of Law

#### a) Complainants

462. "The cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole ones inspected and there is nothing in the inspection to benefit the utility or other attacher to the pole."<sup>758</sup> [EAI will stipulate that this quotation is accurate.]

463. It is unjust and unreasonable for EAI to require Complainants to pay charges disproportionate to the benefits they derive from USS' inspection.<sup>759</sup> [EAI cannot stipulate to the remaining statements in this

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<sup>757</sup> Bettis Decl. Resp. Ex. 3 at ¶ 18; Wagoner Decl. Resp. Ex. 18 at ¶¶ 42, 48-49.

<sup>758</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).

<sup>759</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610 (1992); *First*

section. EAI does not agree that (a) it was required to apportion costs based on benefit;<sup>760</sup> or (b) that Complainants' allocated share was "disproportionate."]

464. It is unjust and unreasonable for EAI to require Complainants to pay charges for USS' survey.<sup>761</sup>

**b) EAI**

465. The question posed is a question of fact, not of law. [Complainants disagree. The motivation for the inspections is relevant to whether they are just and reasonable.]

**X. DISCRIMINATION**

**A. Whether EAI's Policies Discriminate In Favor Of Other Communications Companies**

**1. Stipulated Facts**

466. None.

**2. Disputed Facts**

**a) Complainants**

467. EAI's policies and standards are not applied on a non-discriminatory basis. EAI shows preference to attachers that hire USS,

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*Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610 (1992).

<sup>760</sup> *CTAG* at ¶ 15.

<sup>761</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610 (1992).

including Cox and another cable television operator.<sup>762</sup> [EAI cannot stipulate to these statements. EAI applies its standards in a nondiscriminatory manner. Complainants' allegation regarding preference to attachers hiring USS was not raised in the Complaint. In any event, EAI is not affiliated with USS and derives no benefit from USS' employment by other entities.<sup>763</sup>]

468. EAI has not imposed a permitting freeze on telephone companies and does not require telephone companies to pay USS' charges.<sup>764</sup> [EAI cannot stipulate to this statement. Complainants have not previously alleged that EAI has not implemented a permitting freeze on other attachers. EAI's safety inspections addressed the attachments that were shown to require full inspections through outage and trouble reports and test inspections. EAI's relationship with SBC, an ILEC, is not governed by the Pole Attachment's Act. EAI has had no occasion to conduct safety inspections of telephone company plant.<sup>765</sup>]

#### **b) EAI**

469. EAI has not discriminated in favor of itself or other parties in terms of its standards or application of those standards.<sup>766</sup> EAI does not favor companies that hire USS to perform engineering tasks. [Complainants cannot stipulate to this fact for the reasons set forth in their disputed facts section above.]

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<sup>762</sup> Gould Reply Decl. ¶¶ 31-39; Billingsley Reply Decl. ¶¶ 48-51.

<sup>763</sup> Arnett Decl. Resp. Ex. 1 at ¶ 10.

<sup>764</sup> Response ¶ 225, pp. 123-124; Harrelson Reply Decl.; Compl. ¶ 59.

<sup>765</sup> Resp. ¶¶ 128, 129; Kelley Decl. Resp. Ex. 11 at ¶ 12.

<sup>766</sup> Bettis Decl. Resp. Ex. 3 at ¶ 21; Lovell Decl. Resp. Ex. 13 at ¶ 4.

### **3. Stipulated points of law**

470. Utilities are required to provide non-discriminatory access to their poles. Non-discrimination does not require identical treatment or terms. Non-discrimination does not require EAI to offer identical terms to all attachers.<sup>767</sup>

### **4. Disputed Points of Law**

#### **a) Complainants**

471. EAI must provide access on just, reasonable and non-discriminatory terms.<sup>768</sup>

472. It is unjust and unreasonable for EAI to enforce selectively safety standards.<sup>769</sup> [EAI cannot stipulate to these statements. EAI has not selectively enforced its standards.]

#### **b) EAI**

473. With respect to the safety inspections, EAI implemented them as to the subject companies only after its investigation into outage and trouble reports involving their facilities and its evaluation of the results of a test inspection that identified wide-spread safety concerns.<sup>770</sup> If similar data and circumstances are present or identified with respect to another attacher, EAI would take the appropriate measures to ensure the safety of its plant

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<sup>767</sup> *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, ¶¶ 11, 14 (2001); *Telecom Order*, 13 FCC Rcd 6777, ¶¶ 20-21 (1999).

<sup>768</sup> 47 U.S.C. § 224.

<sup>769</sup> *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, ¶ 19 (2000).

<sup>770</sup> Lovell Decl. Resp. Ex. 13 at ¶ 7-8.

and to enlist the cooperation of the attacher. [Complainants cannot stipulate to this paragraph. If a large number of violations revealed in test inspections were actually the trigger for the inspections, the tens of thousands of violations EAI found attributable to itself and to the telephone companies should have triggered a full inspection of both EAI's and the telephone companies' facilities<sup>771</sup>].

474. With respect to Complainants' recent claims that EAI gave preferential treatment to firms hiring USS, this issue was raised only in Reply and is not properly before the Commission. In any event, EAI has no incentive to require attachers to hire USS (other than to encourage use of a qualified and experienced contractor in whom EAI has confidence), in that it is not affiliated with USS in any way and does not benefit financially from USS' business. [Complainants cannot stipulate to this paragraph. The information was offered to rebut EAI's claims that it administered its joint use program nondiscriminatorily. Further, Complainants cannot stipulate that EAI does not benefit from USS' operations. Everywhere USS is involved, EAI gains valuable information about its own plant.<sup>772</sup>]

475. Similarly, the discrimination claims related to EAI's treatment of Cebridge were raised for the first time in Reply, and are not properly before

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<sup>771</sup> Complaint III.D.1; Kelley Decl. ¶ 12; Response ¶ 38, p. 24.


<sup>772</sup> Reply Exh. 6; Billingsley Reply Decl. ¶¶ 64-65; Gould Reply Decl. ¶¶ 45-46; Response Exh. 1, ¶ 6; Reply Exh. 8; Hooks Decl. ¶ 33; Compl. Sec. IX.A.1; USS Work Codes (Compl. Exh. 30); Sample Worksheets (Compl. Exh. 31); Dial Reply Decl. ¶¶ 11, 17-18; Kelley Decl. 12.

the Commission. EAI requires the same terms and conditions for permits of all licensees.<sup>773</sup> [Complainants cannot stipulate to this paragraph. The information was offered to rebut EAI's claims that it administered its joint use program nondiscriminatorily. Further, Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section above.]

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<sup>773</sup> Bettis Decl. Resp. Ex. 3 at ¶ 32.




  
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Dated: August 29, 2005

CERTIFICATE OF SERVICE

I, Delores Butler, do hereby certify that on this 29th day of August 2005, a single copy (unless otherwise noted) of the foregoing "Joint Statement" was hand-delivered to the following:

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